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In The

Supreme Court of the United States

October Term, 1979

No. 79-1741

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON,

Petitioners,

R. G. P. INCORPORATED, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Respondents (Petitioners on separate petitions),

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 15, 1980.

OPINIONS BELOW AND OF THIS COURT

The following opinions of courts in this case have been rendered:

The opinion of this Court, dated June 20, 1979, upon certiorari to the Eighth Circuit (Nos. 78-160, 78-161), is reported, *Wilson v. Omaha Indian Tribe, et al.,* 442 U. S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979), and is reproduced in the Appendix to this Petition for Certiorari.

The opinion of the Court of Appeals for the Eighth Circuit dated January 15, 1980 on remand from the United States Supreme Court is reported, *Omaha Indian Tribe v. Wilson, et al.,* 614 F. 2d 1153, and is reproduced in the Appendix to this Petition for Certiorari.

The Memorandum Opinion and the Findings of Fact and Conclusions of law of the District Court for the Northern District of Iowa are reported, *United States v. Wilson,* 433 F. Supp. 57 and 67 respectively. They are reproduced in Appendix B (Page 1 Findings, Page 51, Conclusions), and Appendix C (Opinion) to the previous Petition for Certiorari filed in this case by Wilson, et al. (No. 78-160).

The first opinion of the Court of Appeals for the Eighth Circuit was dated April 11, 1978. It is reported, *Omaha Indian Tribe v. Wilson, et al.,* 575 F. 2d 620. It is reproduced as Appendix A to the previous Petition for Certiorari filed in this case by Wilson, et al. (No. 78-160).

Hereinafter the appendix to this petition will be referred to as App. and the Appendices to the previous petition for certiorari (No. 78-160), as App. A, App. B, etc.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit to which this Petition is directed was entered on January 15, 1980. A timely petition for rehearing with suggestion that rehearing be *in banc* was filed on January 29, 1980, and denied on February 8, 1980 (App. 49). This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. Code § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

One of the two questions upon which this Court previously granted certiorari is "whether the Eighth Circuit erred in holding that federal and not state common law with regard to accretion and avulsion is applicable in this case." This Court held that federal law is controlling, but that the law of Nebraska should be borrowed as the federal rule of decision in this case, not federal common law as the Eighth Circuit had held, and this Court remanded this case to the Court of Appeals to consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts in this case. On remand the Court of Appeals held that Nebraska law is the same as what it previously said was federal common law—that rapid accretion is in law avulsion; that to have an avulsion it is not necessary that any fast land be cut off from one bank of the river and become attached to the other, identifiable, in place, or that the river abandon its

old bed and acquire a new one, but that there may be an avulsion within the bed, i. e., where the thalweg passes over or around a sandbar or piece of shore, and that even that piece of riverbed need not be identifiable. This decision of the Court of Appeals is contrary to the law of Nebraska as established by numerous decisions of its Supreme Court. Because of its erroneous view of Nebraska law, the Court of Appeals held that the District Court did not correctly interpret the Nebraska law and did not properly apply it to the facts in this case. Accordingly, there are presented for review the following questions:

1. Whether the Court of Appeals erred in holding that the District Court did not correctly interpret the Nebraska law of accretion and avulsion.

2. Whether the Court of Appeals erred in holding that the District Court did not properly apply the Nebraska law of accretion and avulsion to the facts in this case.

3. Whether the Court of Appeals erred in setting aside the findings of the District Court as "clearly erroneous" within the meaning of Federal Rule of Civil Procedure 52 (a).

Under its former grant of certiorari in this case this Court construed 25 U. S. Code § 194 but did not consider its constitutionality and should now determine—

4. Whether Title 25, U. S. Code § 194, putting the burden of proof on "the white person" in a suit by "an Indian", is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian tribes against all other races and de-

prives petitioners of their property and of the equal protection of the law in violation of the due process clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 52(a).

> • • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. • • •

United States Code, Title 25, § 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

Derivation. Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause.

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

STATEMENT OF THE CASE

This case is a consolidation of suits, brought by the Omaha Indian Tribe and the United States as trustee for that Tribe, to quiet title to certain Iowa farm land as being part of the Omaha Indian Reservation, which was established on the Nebraska side of the Missouri River pursuant to a treaty of 1854.

The complaint of the Tribe invoked the jurisdiction of the District Court under 28 U. S. Code §§ 1331 and 1362. The complaint of the United States invoked the jurisdiction of the District Court under 28 U. S. Code § 1345.

The District Court found for the defendants, petitioners herein, on their counterclaims. The Eighth Circuit reversed.

This case was previously before this Court pursuant to its grant on November 13, 1978, of the Petition for Certiorari of petitioners Wilson, et al., (No. 78-160) limited to Questions 2 and 3 presented by the petition, and its grant of the petition for certiorari of the State of Iowa, (No. 78-161) limited to Questions 1 and 4 presented by its petition. The Iowa Questions 1 and 4 were similar to the Wilson Questions 2 and 3 which are:

> "2. Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.
>
> "3. Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case."

In its opinion, this Court construed 25 U. S. Code § 194 to be applicable to place the risk of nonpersuasion

upon the defendants in this case excepting the State of Iowa; found federal law of accretion and avulsion was controlling but that the law of Nebraska should be borrowed as the federal rule of decision in this case; and this Court remanded this case to the Court of Appeals to consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts in this case.

As stated in our introduction to the "Questions Presented" in this petition, the Court of Appeals on remand asserted that Nebraska law is not what the District Court found it to be, but is the same as what in its previous opinion the Court of Appeals had said was federal law. Accordingly, it again vacated the judgment of the District Court, which quieted title in defendants, and remanded the case to that Court with directions to enter judgment quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Omaha Tribe.

The differences between the Nebraska law as determined by the District Court, and the Nebraska law as determined by the Court of Appeals may be summarized as follows:

The District Court said that addition of land to a river bank by deposition of alluvium is accretion regardless of how rapid that deposition may be.[1] The Court

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[1]433 F. Supp. 64, App. C, pp. 13, 14.

of Appeals says that sudden or rapid deposition of alluvium constitutes an avulsion.[2]

The District Court said that for a river movement to be an avulsion the river must abandon its old bed and acquire a new one.[3] The Court of Appeals says a movement of the thalweg within the bed may be an avulsion.[4]

The District Court said that for a river movement to be an avulsion there must be a cut-off of fast land from one bank and its attachment to the other. The Court of Appeals says that is not necessary.

Finally the District Court said that the fast land claimed to have been cut-off must be identifiable after the river movement as the same land existing in the same area before such movement. The Court of Appeals says there doesn't have to be any such identifiable land,[5] or even identifiable shore or sandbar.

The Court of Appeals refuses to recognize the distinction between areas above and those below the ordi-

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[2]App. p. 42, 614 F. 2d 1159. It did not define "rapid" or "sudden" in this context, but since no witness suggested any addition to bank taking place in less than one high water period, deposition in one high water period must be sudden or rapid in the eyes of the Court of Appeals and therefore constitutes an avulsion. Perhaps that Court considers change taking place over eleven years to be sudden, for in its first opinion it said, "it is clear that the thalweg had moved substantially in a relatively short period of time; perhaps as few as three years, but no more than 11 years." 575 F. 2d 645, App. A, p. 61, 62).

[3]433 F. Supp. 90, App. B, p. 57.

[4]App. p. 42, note 8, 614 F. 2d 1159.

[5]App. p. 42, 614 F. 2d 1159.

nary high water mark;[6]; between fast land[7] and riverbed[8]; between land on or above the bank[9] and the low sandy point bar,[10] between islands[11] and mere sandbars.[12]

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[6]The ordinary high water mark is the line to which high water ordinarily reaches, coordinate with the limit of the bed of the river and below which the action of the water has destroyed the value of the soil for agricultural purposes. *Borough of Ford City v. United States,* 345 F. 2d 645 (CA 3, 1965), c. d. 382 U. S. 902, 115 L. Ed. 2d 156; *State, ex rel. O'Connor, Attorney General, et al. v. Sorenson, et al.,* 222 Iowa 1248, 271 N. W. 234 (1937).

[7]Fast land includes the river bank and other land above the ordinary high water mark of the river. *Howard v. Ingersoll,* 54 U. S. 381, 428, 13 How. 381, 428, 14 L. Ed. 189; and *Hayes v. State,* Ark., 496 S. W. 2d 372, 374 (1973).

[8]The bed of the river is the area between its banks below the ordinary high water mark, including channels, shores and sandbars, but not islands. *Howard v. Ingersoll,* 54 U. S. 381, 428, 13 How. 381, 428, 14 L. Ed. 189 (1851); *State of Oklahoma v. State of Texas,* 43 S. Ct. 221, 225, 260 U. S. 606, 67 L. Ed. 428 (1923); *Barr v. Spalding,* D. C. Ky. 46 F. 2d 798, 800 (1928); *U. S. v. Ray,* C. A. Fla., 423 F. 2d 16, 20 (1970); *Hayes v. State, Ark.,* 496 S. W. 2d 372, 374 (1973); *Houghton v. C., D. & M. R. Co.,* 47 Iowa 370.

[9]The banks of a river are fast land which contain the river at its high flow. The area between the banks is the bed of the river. *Howard v. Ingersoll,* 54 U. S. 381, 428, 13 How. 381, 428, 14 L. Ed. 189 (1851).

[10]The shore is that part of the river bed adjoining the bank below the ordinary high water mark but above the low water mark and thus exposed above the water surface much of the year. *Barr v. Spalding,* D. C. Ky., 46 F. 2d 798, 800 (1928); *State v. Gerbing,* 47 So. 353, 356, 56 Fla. 603 (1908); *Brickell v. Trammell,* 82 So. 221, 227, 77 Fla. 544 (1919); *Sundial Ranch v. May Land Company,* 119 P. 758, 762, 61 Ore. 205 (1912).

[11]An island is a body of fast land entirely surrounded by water. *Summerville v. Scotts Bluff County,* 183 Neb. 311, 154 N. W. 2d 517 (1967); *Mather v. State,* 200 N. W. 2d 498 (Iowa 1972); *Crow v. Johnston,* 209 Ark. 1153, 194 S. W. 2d 193, 197

(Continued on next page)

As the Nebraska Supreme Court pointed out in *Summerville v. Scotts Bluff County,* 182 Neb. 311, 154 N. W. 2d 517 at 522, quoting *Whitaker v. McBride,* 197 U. S. 510, 25 S. Ct. 530, 49 L. Ed. 857, sandbars are frequently found in western waters, and are of temporary duration, existing today and gone tomorrow.

Additional facts are stated in the argument regarding the application of Nebraska law to the facts in this case.

———o———

REASONS FOR GRANTING THE WRIT

Whether the District Court has correctly interpreted Nebraska law of accretion and avulsion is an important question of state law which the Court of Appeals for the Eighth Circuit has decided in a way in conflict with the applicable law of Nebraska.

This Court directed the Court of Appeals to determine whether the District Court correctly interpreted Nebraska law and properly applied it to the facts in this case. In purporting to do so the Court of Appeals has refused

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(Continued from previous page)

(1946); *Belle Fontaine Improvement Company v. Niedringhaus,* 181 Ill. 426, 55 N. E. 184 (1899).

[12]A sandbar is a portion of the river bed which is below the ordinary high water mark but which is above the water surface part of the time. When exposed, it may be part of the river shore attached to the bank or may be surrounded by water. *Mather v. State,* 200 N. W. 2d 498 (Iowa 1972).

to follow the decisions of the Supreme Court of Nebraska, but has misinterpreted the Nebraska law of accretion and avulsion, and if its decision is allowed to stand, it will throw great confusion into the law of Nebraska as well as into the law generally on that subject. The fact that this Court remanded this case to the Court of Appeals for its consideration of this question will add great weight as a precedent to the Court of Appeals' opinion if this Court now allows that opinion to stand. This Court, having previously assumed jurisdiction in this case, should now review the action of the Court of Appeals and determine whether it complied with the mandate of this Court or incorrectly interpreted Nebraska law of accretion and avulsion.

To allow this Court of Appeals decision to stand will not only permit a miscarriage of justice with regard to the 2900 acres, the subject of the part of this suit so far tried, but will cause confusion and difficulties with the trial of the heretofore untried portion of this case in which the Omaha Tribe claims an additional 8000 acres which has been possessed and farmed in separate tracts by more than 80 different persons and their predecessors in title for generations.

Because the Court of Appeals says its rule is not only Nebraska law but also federal and general law (misconstruing or ignoring decisions of this Court discussed or referred to commencing at page 14 of this Petition), its opinions, if allowed to stand, will cause difficulties to states, the United States, title insurers, mortgagees, Indian tribes, and landowners in other states as well as to those in Iowa, South Dakota and Missouri which border on Nebraska.

Furthermore, since this Court decided that 25 U. S. Code § 194 is applicable to litigation such as this, this Court should also now decide whether § 194 is constitutional. That question is also of great interest and importance to all of the persons described above.

———o———

SUMMARY

The Court of Appeals concedes that there was no identifiable fast land (bank or island) or even *identifiable* riverbed (shore or sandbar) left in place as the thalweg in the Blackbird Bend moved west between 1867 and 1879, or as it moved south from the north high bank between 1906 and 1923 or 1927. Nevertheless, it asserts that the defendants failed to sustain their burden of proving accretion because, in the opinion of the Court of Appeals panel, defendants failed to prove that there was no *possibility* that there may have been an avulsion within the bed of the river in which the thalweg suddenly moved with rapid deposition of alluvium behind it, or in which the thalweg of the river may have passed over or around some unidentifiable piece of shore or sandbar without excavating it to some unspecified depth below ordinary high water mark. Such shore or bar would by definition have been below ordinary high water mark to start with.

But under Nebraska law as announced and applied by the Nebraska Supreme Court, there can be no avulsion within the bed of the river. The increase to riparian land by deposition of alluvium is always gradual and imperceptible no matter how rapid its deposit, and is legal ac-

cretion. And to create an avulsion the river must abandon its old bed and adopt a new one, cutting off fast land between its old and new beds, which land remains identifiable after the change of beds as the same land existing in the same area before such change.

Applying Nebraska law to the "possible" fact situation suggested by the Court of Appeals, the defendants sustained their burden of proving accretion by much more than a preponderance of the evidence.

Even if shore and sandbars were fast land, the Court of Appeals would not be entitled under Federal Rule of Civil Procedure § 52 (a) to set aside the trial judge's findings that such shore and bars were all completely obliterated and washed away as the thalweg moved west and south and were replaced by the deposit of alluvium behind it. These findings were thoroughly supported by documentary evidence and lay and expert testimony, which the trial judge found more credible than the evidence presented by the plaintiffs. His findings, supported as they are by such evidence and by his inspection of the land in controversy, are entitled to great weight and the Court of Appeals is not entitled to disregard them, but it did.

Although this Court's opinion (App. 27, 442 U. S. 653, 678, 61 L. Ed. 2d 153, 173, 99 S. Ct. 2529, 2535) seemed to give the Court of Appeals a broad hint that applying 25 U. S. C. § 194 should make no difference since the trial court found that defendants had carried the normal burden of persuasion, had proved accretion by a preponderance of the evidence, and had observed that his findings and conclusions would not be altered by any different allocation of the burden of persuasion, the Court of Appeals

in its second opinion stresses Section 194 and apparently considers that it puts a burden on the defendants of proving accretion beyond the possibility of a doubt. If there is any merit in the Court of Appeals' position on this point, then it would seem that this Court should determine whether or not Section 194 is unconstitutional because it is an invidious racial discrimination in favor of Indians against nonIndians.

———o———

ARGUMENT

1. The Court of Appeals' interpretation of Nebraska law is contrary to Nebraska law of accretion and avulsion as determined by that State's Supreme Court.

A. Nebraska Law—Accretion—The deposition of alluvium is always gradual and imperceptible regardless of how fast it may be deposited.

A set of facts which the Eighth Circuit panel would call an avulsion within the bed, but which the Nebraska Supreme Court held to be accretion was presented in *Wiltse v. Bolton, et al.*, 132 Neb. 354, 272 N. W. 197 (1937). Plaintiff claimed the land in controversy as accretion to his riparian land. Defendant alleged avulsion. Judgment for defendant reversed. There the Court said:

> We have carefully examined all of the evidence in this case and are convinced that the action of the river in the spring of 1908 was *not an avulsion, but the shift-*

> *ing of the main channel from the east to the west side of the river bed,* and that the lands in controversy were formed by accretion, and not by an avulsion. (Emphasis supplied.)

There is no evidence, opinion or other, of any change in the river in the case at bar more rapid and sudden than the shift in the main channel in *Wiltse* from one side of the riverbed to the other in one high water period caused by an ice gorge.

The Court of Appeals does not attempt to distinguish or even mention *Wiltse v. Bolton.* The Court of Appeals does attempt to distinguish a similar one high water ice gorge case, *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942), on the ground that no party pleaded avulsion (App. 42, note 7, 614 F. 2d 1159 note 7). In *Conkey,* the Court said (8 N. W. 2d 541, 542):

> . . . The record does not disclose from what land, if any, the area was *cut off* by avulsion, or the situation existing from which it might be reasonably inferred that it could be *identified as the same* land. . . . Some contention is made that it was river-bed land which had accreted to the high bank by the filling in of alluvial deposits which appeared as the water gradually receded. But we do not think this distinction is important, as the rules governing accretions would be applicable in any event.
>
> . . . where a stream, which is a boundary, from any cause suddenly *abandons its old and seeks a new bed,* . . . This sudden and rapid change of channel is termed, in the law, 'avulsion.'
>
> . . . The fact that the river sought a *different channel* as the waters receded is *not* of itself *sufficient* to sustain a finding that an avulsion occurred. (Emphasis supplied.)

Some Nebraska cases commenting on the rapidity of formation of land by accretion on the Missouri River are the following: *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 (1906), vacating 74 Neb. 573, 104 N. W. 1061 (1905),

> ". . . whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion."

DeLong v. Olsen, et al., 63 Neb. 327, 88 N. W. 512 (1901), cited *Nebraska v. Iowa,* 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892) in support of the proposition that the law of accretion applies to the Missouri River notwithstanding the changes are more rapid and extensive than in most other rivers.

In *Lieneman v. Sarpy County,* 145 Neb. 382, 392, 16 N. W. 2d 724, 729 (1944), the Court cited *Nebraska v. Iowa* (1892), for the proposition that accretion no matter how rapid is always gradual and imperceptible, and said:

> ". . . we are not concerned with the rapidity of the movement of the right bank westward. . . ."

B. Nebraska Law — Avulsion — Change of Beds, Cut-off, Identifiability.

In *Iowa Railroad Land Co. v. Coulthard,* 96 Neb. 607, 610, 148 N. W. 328, 329 (1914), the trial court found for the plaintiff on its contention that the land was in Nebraska and had been put on the east side of the Missouri river by an avulsion, but found for the defendant on his claim of title by adverse possession. To define the issue between accretion and avulsion the Court quoted from the opinion in *Coulthard v. Davis,* 101 Iowa 625, 70 N. W. 716, as follows:

> Whether this land has been added in such a way as to be accretion, or whether it has been added by a sudden and *entire change in the river, detaching* this body of land from the west bank of the river, and *attaching* it to what was formerly the east bank of the river, in such a way as that it is *capable of identification,* is the question we are called upon to determine. (Emphasis ours.)

This quotation states three closely related elements of which an avulsion is composed, which have been referred to in numerous Nebraska Supreme Court cases. They are (1) abandonment of the old bed and acquisition of a new one, (2) the cut-off of the intervening fast land from one *bank* (not a piece of the bed of the river), and its attachment to the other bank, and (3) the identifiability of the cut-off land.

When a river abandons its old bed and acquires a new one, it necessarily cuts off the bend which was the old bed and cuts off the land between that old bed and the new bed, and when the bank land is so cut off, it remains identifiable by the nature of its soil, its vegetation, its comparative surface level, and any man-made structures or installations such as surveyor's markers, fences, etc.

In defining "avulsion", the Nebraska cases refer to one or more of the above elements of avulsion.

In *First National Bank v. McFerrin,* 142 Neb. 627, 9 N. W. 2d 167 (1943), the Court said (9 N. W. 2d at 172):

> In denial of the contention of the plaintiff on this issue the defendant adduced evidence that the lands in question cannot be *identified* as lands *cut off* from Nebraska by avulsion.
>
> * * *

> . . . we are convinced that the trial court erred in refusing to submit this controverted issue to the jury.

In several other places in the McFerrin opinion the Court in referring to avulsion used the words "cut off" and "identifiable":

> "It becomes clear then that the parties are in accord on the proposition that, if this is *identifiable* land *cut off* by avulsion, it never was during any period in question a part of the domain of the State of Iowa." (9 N. W. 2d 169, 7 N. W. 2d 176).
>
> * * *
>
> "The parties here do not question that at that time the land in issue here, if it was then subject to *identification,* was not within the Iowa boundaries." (9 N. W. 2d 169).
>
> "It appears then, assuming that the land in question here was *cut off* from the territory of Nebraska by avulsion. . . ." (7 N. W. 2d 177).
>
> * * *
>
> ". . . if it shall be shown that these lands were *cut off* . . ." (7 N. W. at 178). (Emphasis ours.)

Additional cases defining "avulsion" using the expressions "cut-off", "identifiable," "identified," "identification" and "abandons its old and seeks a new bed" include: *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647 (1935); *Lieneman v. Sarpy County,* 145 Neb. 382, 392, 16 N. W. 2d 724, 729 (1944); *Durfee v. Keiffer,* 168 Neb. 272, 95 N. W. 2d 618 (1959); *Conkey v. Knudsen,* 141 Neb. 517, 4 N. W. 2d 290 (1942); *Valder v. Wallis,* 196 Neb. 222, 242 N. W. 2d 112 (1976); *Frank v. Smith,* 138 Neb. 382, 293 N. W. 329 (1940); *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 (1906); and *Bouvier v. Stricklett,* 40 Neb. 792, 59 N. W. 559 (1894).

The Court of Appeals recognized that many Nebraska cases, relied upon by the District Court, emphasize identifiable land in place in defining avulsion, and it cited no Nebraska case to the contrary. Nevertheless it insisted that identifiable land is not a necessary element of avulsion under Nebraska law (575 F. 2d at 635, note 30; App. 43, note 8, 614 F. 2d 1159 note 8).

Island Rule.

In support of its contention that there may be an avulsion within the bed of the river, i. e., without the river abandoning its old and seeking a new bed, the Court of Appeals panel relies on the island rule, namely, that where there is an island in a river and the flow of the river in the main channel diminishes and that in the lesser channel increases so that the latter becomes the main channel without the island being eroded away, the ownership of and jurisdiction over the island does not change, and the boundary line remains in the middle of the former main channel. The island rule is sometimes called an exception to the rule of accretion, *Commissioners v. U. S.*, 270 F. 110, 113 (CA8, 1920) and sometimes called "a situation to which the law of avulsion applies," *Durfee v. Keiffer,* 168 Neb. 272, 195 N. W. 2d 618, 624 (1959). Islands are above the ordinary high water mark and are not part of the river-bed, so the island rule gives no support to the Court of Appeals' contention that there may be an avulsion within the riverbed.

The present case involves no islands. However, the Court of Appeals attempts to extend the island rule to riverbed, seeking support from the case of *State v. Eck-*

lund, 147 Neb. 508, 23 N. W. 2d 782 (1946) (App. 39, 43, 614 F. 2d 1157 and 1159), which the Court of Appeals says was a case "in which title to old riverbed land bared by a river's gradual change in channel was retained in accordance with the original boundary line, as is the case in avulsion." The Court of Appeals implies that the "old riverbed land" was still riverbed when the change of channel occurred. But that was not the case. By "old riverbed" the Nebraska court obviously meant former riverbed. Before the change of channel occurred, the area involved had become an island. It was described in the opinion as "relicted, and is covered with willows and brush and good grass for pasture" (23 N. W. 2d at 787, 789) and the Court said:

> The thread of the stream, flowing on the north side when each of the parties hereto secured their land, did not gradually move over the *subsequently formed* intervening lands that were formed to the south thereof. However, the south branch of the river flowing south of Ware Island did finally become the main channel, *but this was subsequent to the formation of the land herein involved,* and the true boundary line between the respective riparian owners remains the line of the thread of the stream where it formerly ran in the north channel. (Emphasis supplied.)

The change in the main channel from the north to the south of the land in controversy occurred subsequently to that area having become an island, growing good grass for pasture. It was not then riverbed. *Ecklund* is simply an application of the island rule to an island. It does not support the Court of Appeals' theory that there may be an avulsion within the bed of the river.

As noted by this Court in its opinion (App. 9, note 12; 442 U. S. 653, 663, 99 S. Ct. 2529, 2535, 61 L. Ed. 153, 163):

> The Court of Appeals relied on two cases, *Veatch v. White,* 23 F. 2d 69 (CA 9 1927), and *Uhlhorn v. U. S. Gypsum Co.,* 366 F. 2d 211 (CA 8 1966), cert. denied, 385 U. S. 1026 (1967), in concluding that, under federal law, "the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion." 575 F. 2d at 637.

Since it really found no support in Nebraska cases, the Court of Appeals reasons that Nebraska has followed federal precedents and therefore would follow *Veatch* and *Uhlhorn.* The facts in *Veatch* are unclear. In *Uhlhorn,* the Eighth Circuit panel made an exception to the rule that there may be no avulsion within the bed of the river because the area involved, although it was described as below the ordinary high water mark at the time it was cut off by creation of a new bed and channel by dredging by the U. S. Engineers, it was nevertheless, when so cut off, to quote from the Court of Appeals' opinion, a "massive land mass . . . infrequently submerged . . . solid and compact . . . as discernable, intact and identifiable after the channel change as it was before . . . did not suffer erosion. . . ." The area involved in this case is quite the opposite,—frequently submerged, readily erodable, not identifiable. There is no reason to think that the Nebraska Supreme Court would consider that *Uhlhorn* is a precedent for holding that an avulsion (or five or six of them) would exist if a factual situation similar to the present case were presented to it.

This theory of the Court of Appeals that there may be an avulsion within the bed of the river is impossible to reconcile with the established law of Nebraska and with the realities of the movements of the wild Missouri river. If the area in question were fast land, either bank land or island, before the river movements involved, it could no longer be deemed the subject of an avulsion if it were to be eroded down below the ordinary high water mark. When that happens it becomes riverbed, *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 720 (1959); *Summerville v. Scotts Bluff County,* 182 Neb. 311, 154 N. W. 2d 517 (1967), and the person who owned it before its erosion will continue to own it only if he still owns the Bank, and if as such riparian owner he owns the bed of the river to the thalweg (as in Nebraska but not in Iowa) and if the area in question continues to be on his side of the thalweg. Otherwise he loses ownership of such former bank land which has become riverbed. But according to the Court of Appeals, if the area in question was already below the ordinary high water mark before the movement of the thalweg, then when the thalweg moves around or over it, "within the bed of the river" it is to be considered an avulsion unless it is proven that there was no possibility that such riverbed was not completely disintegrated—eroded to some depth, the Court of Appeals doesn't say what depth, below the ordinary high water mark. How totally impracticable this rule of the Court of Appeals is, is made apparent by consideration of the nature of sandbars, that

they "are of temporary duration, existing today and gone tomorrow." *Summerville v. Scotts Bluff County,* 182 Neb. 311, 154 N. W. 2d 517, quoting from *Whitaker v. McBride,* 197 U. S. 510, 25 S. Ct. 530, 49 L. Ed. 857 (1905).[13]

The rule that the boundary will be the thalweg except in case of a cut-off of a bend is a practicable rule. The Court of Appeals' rule is not.

C. The Nebraska Supreme Court decisions are consistent with federal and general common law of accretion and avulsion—the Eighth Circuit panel's decision in this case is not.

In *County of St. Clair v. Lovingston,* 23 Wall. (90 U. S.) 46, 23 L. Ed. 59 (1874) the Court defined accretion [alluvion] as follows:

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[13]See also Appendix S of the Annual Report of the Chief of Engineers for 1881, by Major C. R. Suter (W. Ex. XX, Tribe's Ex. 65, R. 1800, 1801) where it is stated with respect to the Missouri River at p. 1652 (quoted by District Court in its findings, App. B, pp. 11, 12; 433 F. Supp. 72): "The enormous amount of material thus precipitated into the river, together with that scoured from the bed, causes the formation of innumerable bars, which, even at high water, obstruct navigation. These bars are constantly in motion, their position and shape changing from day to day. The channels through them are also changing both in depth and location, rendering navigation correspondingly uncertain. Owing to the incessant bank erosion the river is steadily increasing the width between high banks, as the bars which are formed opposite caving shores take time to build up to the general level, and are meanwhile liable to be themselves attacked and swept away. The erosion which usually occurs on the upper sides of points, causes these points to move bodily down stream. Where the erosion is more rapid than the bar growth below, the point disappears, ..."

> "In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

To that definition the Supreme Court added a gloss in its very extensive discussion of accretion and avulsion in *Nebraska v. Iowa,* 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892). It there pointed out that accretion, the deposition of alluvium, no matter how rapid, is always gradual and imperceptible within the meaning of its legal definition. The Court said (143 U. S. 359, 369, 12 S. Ct. 396, 399, 36 L. Ed. 186, 190):

> "The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. . . . There is, no matter how rapid the process of subtraction *or addition,* no detachment of earth from the one side and deposit of the same opon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is the *rapidity* of the change caused by the velocity of the current; and this in itself, in the very nature of things, works *no change in the principle* underlying the rule of law in respect thereto." (Emphasis ours.)

The case of avulsion "noticed hereafter" was a neck cut-off. The Court said (143 U. S. 359, 370, 12 S. Ct. 396, 400, 36 L. Ed. 186, 190):

". . . in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but that of avulsion."

The Court in *Nebraska v. Iowa* (1892) also defined "avulsion." It said:

"It is equally well settled, that where a stream which is a boundary, from any cause suddenly *abandons its old and seeks a new bed*, such change of channel works no change of boundary; . . ." (143 U. S. 359, 361, 12 S. Ct. 396, 397, 36 L. Ed. 186, 188).

Quoting *Vattel*, the Court continued:

". . . in the *very uncommon* case called avulsion where the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner *that it can still be identified*, the property in the soil so removed naturally continues vested in its former owner."

• • •

". . . if, instead of a gradual and progressive change of its bed, the river . . . *turns entirely out of its course* and runs into one of the two neighboring states, the *bed which it has abandoned* becomes thenceforward their boundary. . . ." (Emphasis ours.) (143 U. S. 359, 365, 12 S. Ct. 396, 398, 36 L. Ed. 186, 189).

Thus, the Court made it clear that when a boundary river changes its course by erosion of one bank and deposition of alluvion to the other, no matter how rapid, such deposition constitutes legal accretion, and the boundary remains the middle of the main channel notwithstanding the fact that the channel has moved. On the other hand where the river suddenly abandons its old bed and secures an entirely new bed thus separating fast land from one bank

and attaching it to the other in such manner that it can still be identified as the same land, as when the river, having formed an ox-bow bend cuts through the neck of the meander lobe, that action constitutes an avulsion and the boundary remains in the middle of the abandoned river bed, and the ownership of the cut-off land remains the same.[14]

The Court of Appeals tortures *Nebraska v. Iowa* (1892) into merely stressing that to be legal accretion deposition of alluvium must be gradual and imperceptible, instead of stressing that deposition, no matter how rapid, is always gradual and imperceptible.

In its second opinion the Court of Appeals finds Nebraska law to be the same as it previously found federal law to be.

On the contrary, a review of the Nebraska cases will demonstrate that Nebraska law is the same as the federal law stated in the report of the Special Master which was "in all things confirmed" by this Court in *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966), but which the Court of Appeals ignores. This suit involved ownership of an oil well and the right to oil pro-

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[14]*Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892) continues to be cited as accepted law by this Court as well as by other federal and state courts, e. g., *Oklahoma v. Texas*, 260 U. S. 606, 637, 67 L. Ed. 428, 435, 43 S. Ct. 221 (1922); *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966), Special Master's Report pp. 14, 15, 16; *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313, 326, 38 L. Ed. 2d 526, 539, 94 S. Ct. 517 (1973) (Overruled on other grounds, *Oregon v. Corvallis*, infra); *Mississippi v. Arkansas*, 415 U. S. 289, 291, 39 L. Ed. 2d 333, 339, 94 S. Ct. 1046 (1974); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375, 50 L. Ed. 2d 550, 561, 97 S. Ct. 502 (1977).

duced from it, the bottom hole of which was under the bed of the Mississippi River and which was on the west or Louisiana side of the thalweg when it first became a producer. Shortly thereafter the thalweg moved across the well location. Louisiana claimed the boundary had become fixed before the well was drilled because of an avulsion in 1950-52 within the bed of the river. The Special Master asked (page 17 of his report):

> Can there be an avulsion where the entire change in the channel takes place in the same riverbed, leaving no surface land between the two channels?

He answered the question in the negative. He said (p. 19):

> The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artifiicial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the "live thalweg" is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible. It is conceivable that the term "sudden" should be applied in a more flexible sense than its use in ordinary conversation. But even conceding the strength of this argument, *we have been unable to find any case,* with facts similar to the instant case, *in which an avulsion has*

> *been found by the Court where the river remains in the same bed of the stream.* In all such cases the new channel was formed when the river "suddenly leaves its old bed and forms a new one * * *." *Arkansas v. Tennessee,* 246 U. S. 158, 173. (Emphasis supplied.)

A review of Nebraska law will demonstrate that it is the same as the basic common law stated in 93 C. J. S. 751, *Waters,* Sec. 76, as follows:

> In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvion, it is accretion, but, if the stream changes its course suddenly and *in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified,* it is not accretion. (Emphasis ours.)

Illustrating accretion, the C. J. S. text writer continued:

> Thus, a gravel bar formed during a flood on the bank of a stream is the result of accretion and not of an avulsion, even though a gravel bank on the opposite bank caved in during the flood and was carried by the action of the water in the direction of the new bar.

2. The Court of Appeals erred in holding that the District Court did not properly apply the Nebraska law of accretion and avulsion to the facts in this case.

"Part III. Application of Law to Facts" of the Court of Appeals' second opinion starts out (App. 46, — F. 2d —):

> Even assuming the district court properly interpreted Nebraska law, nonetheless our review of the record demonstrates the district court findings are clearly erroneous. Even if it be assumed that identifiable land in place is the *sine qua non* of avulsive movement, the

> evidence of identifiable land in place or the lack thereof is simply too inconclusive, too dependent on speculation and conjecture, to support the inference of accretive change.

But the Court of Appeals in its first opinion seems to concede that there was no identifiable fast land or even identifiable shore left in place as the river channel moved in its bed from east to west between 1867 and 1879. The Court said (575 F. 2d at 641, App. A., p. 43):

> It is conceded that the eastern end of the Barrett Survey was made up of sandy material. Thus, even if the river changed by avulsive movements through the end of the meander lobe, the land remaining in place would have been low and composed of sand.

As to the movement of the river southward from the north high bank of the Blackbird Bend area between 1906 and 1923, the Court of Appeals said (575 F. 2d 649, App. A, pp. 62, 63):

> . . . after 1890 as the river moved in a northerly direction alluvion soil subject to frequent inundation was deposited throughout much of the area. Thereafter, when the river moved southwesterly away from the northerly high bank, either by accretion or as the result of avulsion, this sandy area would not reveal any conspicuous identifiable features.

"Possibility" that fragment of sandbar not obliterated.

Again with reference to Barrett's low sandy point, the Court of Appeals said, "Although it is possible that Bar C [on the 1879 map, App. p. 52], may have completely eroded. . . . The record also supports the *possibility* that Bar C was the same surface area described by Barrett. . . ." (App. A, p. 44, 575 F. 2d 641). (Emphasis ours.)

Again with reference to Bar C and others bars of 1879 the Court of Appeals said (App. A, p. 49, 575 F. 2d 643):

> The parallel positioning of Bars A, B, C, and D, while perhaps characteristic of accretion, could have resulted from the accretion which followed as an effect of avulsion as well.

And in footnote 59 of its first opinion (App. A56, 575 F. 2d at 646), the Court of Appeals said:

> Assuming that the 1890 map shows stabilized accretion land, as the District Court found, it is *plausible* that the "accretion" may have formed from deposition of sediment resulting from a sudden and perceptible shift in the thalweg. (Emphasis supplied.)

Accretion which follows as a result of avulsion is nevertheless accretion. *Lieneman v. Sarpy County,* 145 Neb. 382, 392, 16 N. W. 2d 724, 729 (1944); *Louisiana v. Mississippi,* 384 U. S. 24, 16 L. Ed. 330, 86 S. Ct. 1250 (1966) Special Master's Report.

Because the defendant's evidence did not convince the Court of Appeals that there was no *"possibility"* that Bar C of 1879 was a remaining fragment of Barrett's low sandy point of 1867 which had not been completely disintegrated, as the thalweg moved west between those dates, and that there was no *"possibility"* that some sandbar that may have been deposited after 1890 on the Nebraska side of the thalweg as the river moved north may not have been completely disintegrated as the thalweg moved back to the south and west, the Court of Appeals says that the District Court finding that the defendants sustained their burden of proving accretion is clearly erroneous. But defendant's burden was to prove accretion only by a preponderance of the evidence, not beyond any possibility of

a doubt, as implicitly held by this Court (App. 27, 442 U. S. 653, 678, 61 L. Ed. 153, 173, 99 S. Ct. 2529, 2535).

Since the only serious suggestion of avulsion made by the Court of Appeals is that there were avulsions within the bed of the river, it follows that the District Court properly applied the Nebraska rule that there can be no avulsion within the bed of the river, and properly concluded that defendants sustained their burden of proving accretion.

3. Whether a Court of Appeals may disregard Federal Rule of Civil Procedure 52 (a) and substitute its findings for those of the District Court is an important federal question which the Eighth Circuit panel decided in a way in conflict with applicable decisions of Courts of Appeals for other circuits and of this Court, and with previous Eighth Circuit decisions.

Even if the Court of Appeals were entitled to treat shore sandbars as riparian fast land and to treat sandbars surrounded by water as islands, it would nevertheless not be entitled to hold that the District Court's findings of accretion and its judgment for defendants were clearly erroneous within the meaning of Federal Rules of Civil Procedure § 52 (a).

The District Court found (App. B, p. 28; 433 F. Supp. 79) that "by 1879 the action of the Missouri river had completely obliterated and washed away the meander lobe as surveyed by Barrett to" the stub shown on the 1879 map (App. 52) as still attached to the Nebraska bank, and found that in its southern migration from the northern high

bank it likewise eroded all land in its path, depositing alluvium behind it. The District Judge was "satisfied that no other conclusion is tenable from the evidence in this case." (App. B, p. 45; 433 F. Supp. 85).

The District Judge's findings were based in part on the testimony of defendants' expert witnesses whose opinions the Court found more credible than those of plaintiff's experts, but the finding of accretion was supported by much additional evidence.

Short summary of accretion evidence.

Statements of facts in this case are contained in the previous petition for certiorari of Wilson et al. (No. 78-160), pages 7-10, and in the Wilson et al. brief, pages 14-17, and reply brief, pages 14-20. We will not repeat here those fact statements but will here substitute an even more abbreviated statement which we think will suffice for this petition.

According to its surveyor, Barrett, who meandered the Nebraska shore in May of 1867 after the April rise had subsided and before the June rise, the low sandy point in 1867 was frequently inundated, worthless for cultivation, readily erodable and likely to be eroded (Barrett's field notes, Tribe's Ex. 26 d and e, R. 21, 22).

The upper limb of Blackbird Bend eroded downstream noticeably between the 1867 (App. p. 50) and 1875 (App. p. 51) maps showing the destruction of the point to be progressing.

The destruction of the low sandy point reflected in the 1879 map (App. p. 52) left no cut-off lake or other indicia

of avulsion. The pre-existing chute remained and did not become the channel.

The Monona County, Iowa, Surveyor, surveyed the eastern Blackbird Bend area in 1894 as accretion to Iowa riparian land.

No documentary evidence indicating any avulsion was ever discovered.[15]

The southward migration of the river from the north high bank and correlating erosion of the Nebraska bank progressed about a mile south between 1907 and 1908 eroding about 400 acres of Indian allotted lands by October of 1908 (Wilson Ex. R, R. 535, 592). West Bank erosion continued until after 1923, the sliver of Barrett survey area shown on the 1923 map as remaining west or south of the thalweg having disappeared before the survey for the 1927 U. S. Engineer's map was made.

Some of the area now occupied by Iowa land was in 1867 occupied by fast land on the Nebraska bank of the river and before 1906 it had been allotted to Indians, and some of it fee patented and out of trust. The erosion of this land between 1906 and 1927 was thoroughly documented by correspondence obtained by discovery procedures from the Bureau of Indian Affairs files in which the allottees relinquished their allotments in exchange for new allotments because their original allotments had been or were in the process of being washed down the river. See

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[15]The total absence of any known historical reference to an avulsion in the area was cited as important evidence that there was none in *Mississippi v. Arkansas*, 415 U. S. 289, 293, 39 L. Ed. 2d 333, 94 S. Ct. 1046 (1974); likewise in *Bone v. May*, 208 Iowa 1094, 225 N. W. 367 (1929).

Wilson Exs. A through P (R. 104, 106, 110), F4 (R. 2059, 2061), and R (R. 535, 592). The Court of Appeals concedes the erosion of this bank land (Court of Appeals 4/11/78 Opinion, App. A, pp. 60, 62, 575 F. 2d 648, 649).

In 1916, Joe Kirk built a log cabin on the bar land south of land on the north high bank which he owned.

George W. Prichard, now a retired Iowa District Judge, observed the area frequently while hunting along the river from 1909 to 1913 when, as he testified, it was a mere sandbar forming in the river. By 1919 when he toured the area on horseback with Joe Kirk the northern and obviously older part was usable for crop land, but the land was lower and wetter farther south and not yet capable of cultivation. There were no large trees, but such trees as there were were smaller as one went south. Judge Prichard saw nothing to indicate that any of the land had been land in place transferred to the Iowa side from the Nebraska side of the river. He saw only new bar land.

In a suit filed in 1928 with decree entered in 1929, the Court quieted title to much of the area as being accretion to the land of Joe Kirk on the north Iowa high bank.

Based on their very extensive knowledge of the behavior of wild rivers, including the Missouri, and on their study of the land, its topography, its vegetation, its soil, and all maps available and hydrological data, it was the opinion of Huber, Hallberg and Kennedy, each an extremely well qualified expert, that all of the Barrett survey area and any accretions thereto were completely eroded away and washed down the river, and that the land now in the Blackbird Bend area is all accretion to the Iowa riparian land.

District Court's findings entitled to great weight.

In addition to the foregoing, the District Judge devoted one of the twenty-one trial days to inspecting the Blackbird Bend area and in particular those topographical features which the parties deemed most significant. Even the Supreme Court of Nebraska which, unlike Federal Courts of Appeal, reviews equity cases *de novo,* in determining the weight of the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying, and "when the court views the topography of a certain locality, its findings are entitled to great weight." *Worm v. Crowell,* 165 Neb. 713, 87 N. W. 2d 384 (1958); *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647, 649 (1935); *Wemmer v. Young,* 167 Neb. 495, 93 N. W. 2d 837 (1958); *Winkle v. Mitera,* 195 Neb. 821, 241 N. W. 2d 329 (1976).

In view of the evidence we submit that even treating the low sandy point and any other bars that may have arisen on the Nebraska side of the thalweg as fast land instead of shore, the District Court's findings that all such were completely eroded away and obliterated and then replaced by the river by accretion to the Iowa riparian land, cannot rightly be termed clearly erroneous. On the contrary, they are clearly supported by a preponderance of the evidence.

As a reason for giving little weight to the findings of the District Court the Court of Appeals said that those findings were "essentially a memorandum written by the defendants" . . . "mechanically adopted" (App. A, note 21, pp. 23, 24, 575 F. 2d 632), and "In reviewing this finding our task is not made easier by the District Court's ver-

batim adoption of defendant's analysis of the evidence and proposed findings of fact including the defendant's credibility assessments of the witnesses (App. A, p. 39, 575 F. 2d 639).

Judge Bogue prepared Findings of Fact and Conclusions of Law (App. B), a written Opinion (App. C), and a Decree (App. D). The 21-page Opinion is entirely the handiwork of Judge Bogue. Of the Conclusions of Law (App. B, 51-61), Judge Bogue adopted defendants' proposed Conclusions in part and rejected them in part. He made seven deletions from defendants' proposed Conclusions and five additions, some quite lengthy. Of the 11 pages,[16] six full pages plus 53 lines on four other pages are Judge Bogue's language. The remainder, much less than half the space occupied by Judge Bogue's Conclusions, were adopted from defendants' proposed Conclusions. Of the Findings of Fact (App. B, 2-51), there were 21 different parts of defendants' requested Findings which Judge Bogue omitted from 12 different pages of his Findings. There were 30 parts of 21 pages which Judge Bogue added to defendants' proposed Findings. These insertions of findings not requested by defendants amount to 184 printed lines, equivalent to six pages. Actually, the extensive revisions the District Judge made in the defendants' proposed findings demonstrate that he was unwilling to adopt proposed findings unless satisfied that they were correct, not merely in general but also in detail.

The holding of the Court of Appeals that it may set aside the findings and decree of the District Court because

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[16]We refer to pages and lines as printed in the above appendices, not as printed in 433 F. Supp. 57 and 67.

of the "possibility" that they might be mistaken is contrary to the decisions of this Court.

In *U. S. v. Yellow Cab Co.*, 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949), this Court held that a choice by the trier of facts between two permissible views of the weight of the evidence is not clearly erroneous where the evidence would support a conclusion either way.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969), this Court held that in applying the clearly erroneous doctrine, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo;* the authority of the appellate court is circumscribed by the deference it must give to the decisions of the trier of fact who is usually in a superior position to appraise and weigh the evidence.

The holding of this Eighth Circuit panel is likewise contrary to the decisions of Courts of Appeals for other circuits. See, *Dickens v. U. S.*, (CA 5, 1977), 545 F. 2d 866; see also, *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, (CA 5, 1975), 506 F. 2d 960; *Parmer v. National Cash Register Co.*, (CA 6, 1974), 503 F. 2d 275; *Rochez Bros., Inc. v. Rhoades*, (CA 3, 1975), 527 F. 2d 880, 38 A. L. R. Fed. 709; *Ahern v. Veterans Administration*, (CA 10, 1976), 537 F. 2d 1098; *Pampillonia v. Concord Line*, A/S, (CA 2, 1976), 536 F. 2d 476; *U. S. v. Second National Bank*, (CA 5, 1974), 502 F. 2d 535; *Snodgrass v. Nelson*, (CA 8, 1974), 503 F. 2d 94; *Indiana State Employees v. Negley*, (CA 7, 1974), 501 F. 2d 1239; and *U. S. v. One Twin Engine Beech Airplane*, (CA 9, 1976), 533 F. 2d 1106.

An accretion case involving this point is *Beaver v. U. S.,* (CA 9, 1965), 350 F. 2d 4, 7, c.d. 383 U. S. 937, where the Court said:

> Appellants complain that eyewitness testimony to the character of the river's change was almost nonexistent, and, as a result, the parties and the trier of fact below were required to rely on old maps, aerial photographs and "theoretical reconstruction by hydrologists or engineers." . . . once there exists substantial and valid evidence to enable the trier of fact to conclude that an accretion has taken place the issue cannot here be raised, unless that conclusion is clearly erroneous. For example, Exhibit 10 depicts the river as south of the subject land as of 1930. That evidence alone, we assume, would be sufficient upon which to base a finding of fact.

From the Eighth Circuit itself a pertinent case is *Matthews v. McGee,* 358 F. 2d 516 (8th Cir. 1966), where the District Court had found that a movement of the Arkansas River involved accretion, not avulsion. The following is from the opinion by Blackmun, J.:

> The defendants also state, "The opinion of the District Court * * * presents a concise statement of the nature of the conflicting evidence." Judge Young himself observed, p. 305 of 241 F. Supp.:
>
> "Obviously all of the testimony cannot be reconciled. Much of the testimony concerns old River surveys, opinions, speculation and surmise by witnesses of what may have occurred many years ago. Of all this testimony, the Court thinks that of Mr. Smith the most persuasive."
>
> By Rule 52 (a), Fed. R. Civ. P., findings of fact made by the court are not to be set aside unless clearly erroneous, that is, "only upon clear demonstration that they are without substantial evidentiary support or

that they are induced by an erroneous view of the law." Cole v. Neaf, 344 F. 2d 326, 329 (8th Cir. 1964).

So we submit that the Court of Appeals has failed to properly carry out the mandate of this Court because:

(1) the Court of Appeals finds only, avulsions within the bed of the river, and under Nebraska law no movement of the thalweg merely over or around portions of the riverbed will constitute an avulsion, and

(2) even if fast land—bank land instead of shore, island instead of sandbars—were involved, the District Court's findings could not be deemed clearly erroneous, and the Court of Appeals is in error in holding them so.

4. Whether Title 25, U. S. Code § 194, putting the burden of proof on the "white person" in a suit by "an Indian" as now construed by this Court is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian Tribes against other persons and deprives petitioners of their property and of the equal protection of the law in violation of the due process clause of the Fifth Amendment, is an important question of federal law which has not been, but should be, settled by this Court.

This question was presented in the previous petitions for certiorari in this case but the grant of certiorari was limited to two other questions. However, from questions or comments by Justices during the oral argument we gained the impression that one or more members of this Court were of the opinion that this constitutional question is controlled by this Court's decision in *Morton v. Man-*

cari, 417 U. S. 535, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974). That case involved a preference in employment in the Bureau of Indian Affairs, given by statute to members of "federally recognized" Indian tribes. Footnote 42 of the opinion of Powell, J. in *Regents of the University of California v. Bakke,* 438 U. S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) at 438 U. S. 304, describes *Mancari* as follows:

> Petitioner also cites our decision in *Morton v. Mancari,* 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis. Id.* at 554. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion." Ibid.

In *Mancari,* this Court said (417 U. S. 535, 554, 41 L. Ed. 2d 290, 303, 94 S. Ct. 2474, 2484 (1974):

> Here, the preference is reasonable and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Unlike the *Mancari* preference, the § 194 discrimination is racial. It is not reasonably and directly related to any legitimate non-racially based goal, does not further the cause of Indian self-government or make the BIA more responsive, and we submit that it is clearly a proscribed form of racial discrimination.

For further discussion of this point see the previous petition for certiorari of Wilson et al. in this case (No.

78-160) pp. 11-18, the petition for certiorari of RGP, Inc. et al. in No. 78-162, the amicus brief of Indiana and twenty-eight other states in support of Iowa's petition for certiorari (No. 78-161) pp. 7-10, the amicus brief of California in support of Iowa's Petition (No. 78-161) pp. 7-13 and the amicus brief in support of the three petitions for certiorari (Nos. 78-161, 162 and 163) filed by Gordon Dahl and 81 other farm owners in Monona County, Iowa, pp. 6-10.

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CONCLUSION

Having directed the Court of Appeals to determine whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts in this case, this Court should now follow through on this case and decide whether the Court of Appeals has properly performed the task assigned to it, or has erroneously determined Nebraska law, erroneously applied the law to the facts, and erroneously disregarded Rule 52 (a) of the Federal Rules of Civil Procedure by unjustifiably setting aside the findings of the District Court. And since the Court of Appeals appears to find that 25 U. S. Code § 194 places a greater burden of persuasion on litigants opposing Indian Tribes than proof by a preponderance of the

evidence, this Court should determine the question of the constitutionality of that section.

The writ should be granted.

Respectfully submitted,

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